IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, et al., Plaintiffs, v. TYSON FOODS, INC., et al., Defendants.	Case No. 4:05-CV-329-TCK-SAJ

DEFENDANTS' REPLY ON
MOTION FOR ENTRY OF CASE MANAGEMENT ORDER

I. INTRODUCTION

Defendants have moved this Court to enter a proposed case management order ("Proposed CMO") to facilitate the orderly progress of discovery and to narrow the issues for trial. *See* Docket No. 946. Although all cases warrant some measure of case management, the complexity, magnitude, and geographic scope of Plaintiffs' claims necessitate specialized case management procedures. *See* Fed. R. Civ. P. 16(c)(12). Plaintiffs[1] assert ten claims against thirteen poultry company defendants under various statutory and common law theories for alleged environmental damage to more than 1,000,000 acres of land arising from decades of alleged activities by hundreds of independent poultry growing operations located in both Arkansas and Oklahoma. Defendants' Proposed CMO is similar to "*Lone Pine*" orders routinely entered in large and complex environmental and tort litigation.[2] This Court should enter Defendants' Proposed CMO because it will assist in the formulation and simplification of the issues for trial; identify claims that cannot be supported; and provide an overall economy of time and effort for this Court and the parties by allowing this matter to proceed in an orderly fashion.

Plaintiffs' Response (Docket No. 978) fails to cite any authority which would prohibit this Court from entering the Proposed CMO. According to Plaintiffs, they oppose the Proposed CMO because (1) it would require Plaintiffs to "prove" their whole case "while the case is in only the early stages of discovery," *see* Response at 3, and (2) this case is distinguishable from those in which courts have entered *Lone Pine* orders similar to Defendants' Proposed CMO. *Id.* at 4-6. Plaintiffs' positions are baseless.

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[1] Despite Plaintiffs' repeated assertions that this action has been brought "by a single plaintiff, the State," *see* Response at 1 and 4, this Court has stated that "[t]he current lawsuit involves two Plaintiffs . . ." September 21, 2006, Order to Sever at 3 (Docket No. 914).

[2] As explained in Defendants' Motion, *Lone Pine* case management orders derive their name from *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986), a New Jersey mass tort case involving similarly complex personal injury and property damage claims.

Defendants' Proposed CMO does not require Plaintiffs to "prove" their entire case. The Proposed CMO only requires Plaintiffs to disclose *prima facie* proof of their claims. This is hardly a remarkable proposition because the Federal Rules of Civil Procedure require every plaintiff to produce such evidence before presenting their case to a jury. Significantly, the evidence required by the Proposed CMO includes the basic information Plaintiffs repeatedly claim to have collected prior to, and after filing this action. Moreover, Plaintiffs initiated this litigation almost one and one-half years ago, so this is hardly the early stage of litigation.

In addition to providing for the orderly progress of discovery and narrowing the issues for trial, entry of the Proposed CMO is necessary and appropriate here because of Plaintiffs' refusal to comply with their discovery obligations. Notwithstanding numerous discovery attempts by Defendants, Plaintiffs have stubbornly refused to provide evidence to support the most basic elements of their claims, such as:

(1) the geographic scope of the "facility" or "facilities" for which Plaintiffs seek recovery under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 through 9626;[3]

(2) the specific identity of each constituent Plaintiffs allege should be considered "hazardous" within the meaning of the federal environmental statutes under which Plaintiffs seek recovery;

(3) the location of the poultry farms alleged to have "released" or "disposed" of "hazardous substances" into the environment;

(4) the location of alleged contamination within the more than one million acres of the Illinois River Watershed ("IRW");

(5) the property ownership interests upon which Plaintiffs intend to rely to support their claims of trespass;

(6) the nature of the threat to human health alleged by Plaintiffs; and

[3] Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. have addressed this issue in their Motion for a More Definite Statement With Respect to Counts One and Two of the Amended Complaint. (Docket No. 71). The Motion for a More Definite Statement is pending before the Court and is ripe for decision.

(7) whether Plaintiffs possess any sampling or testing evidence regarding a causal connection between any Defendant and an alleged release of a "hazardous substance" and alleged harm.

The Proposed CMO does not require Plaintiffs to make a final demonstration of proof for their entire case. Defendants simply seek fair notice of Plaintiffs' claims. Therefore, this Court should enter the Proposed CMO because it provides an accepted method to determine whether Plaintiffs are able to "connect the dots" with evidence sufficient to support a *prima facie* case for each of their asserted theories of recovery against each Defendant. Plaintiffs will not be prejudiced or unduly burdened by this procedure because such information should be readily available to Plaintiffs as part of their pre-suit, and presumably on-going, investigation.

Plaintiffs have also failed to distinguish this matter from other complex cases in which *Lone Pine* orders have been used. Plaintiffs' attempt to minimize the obvious complexities of this case by claiming that it involves a "manageable" number of defendants and alleged injury to a "finite" area is specious. Plaintiffs have asserted, *inter alia*, wide-ranging theories of recovery for property damage, nuisance, and statutory violations related to the actions of several hundred poultry growers at independently-operated farms located in a watershed that encompasses more than one million acres. Proof of causation will be very complex because, despite the fact that Plaintiffs have targeted thirteen poultry integrator companies, there are numerous claimed sources of the substances at issue, including the State of Oklahoma. *Lone Pine*-type orders, similar to the Proposed CMO, are used in litigation like this action involving complex issues of causation and numerous parties. *See* Motion at 10-11. Therefore, this Court should follow the lead of jurisdictions that use *Lone Pine*-type orders and enter the Proposed CMO. *See id.*

II. ARGUMENT

A. Defendants Have Never Stated that the Land Application of Poultry Litter Has Caused Any of the Harm Alleged by Plaintiffs

Plaintiffs disingenuously assert that some Defendants have issued public statements which "as much as admitted the adverse impacts of poultry waste on the environment." Response at 2. Plaintiffs desperately mischaracterize the content of Defendants' statements. The public declarations cited by Plaintiffs simply reiterate what Defendants have maintained all along, *i.e.*, that Defendants are committed to protecting the IRW by contracting with independent poultry growers who agree to follow all applicable statutes, rules, regulations, and best management practices for the land application of poultry litter as a natural fertilizer and soil amendment.[4] Defendants have never stated that the land application of poultry litter has caused any of the harm alleged by Plaintiffs. In fact, since this lawsuit was commenced, Defendants have repeatedly demanded, but never received, proof to support Plaintiffs' ceaseless barrage of public and in-court statements about their alleged evidence.

B. Legal and Equitable Considerations Support Entry of Defendants' Proposed CMO

1. The Proposed CMO is Consistent With, and Authorized by, the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure provide this Court with broad, express authority to fashion "special procedures" for management of cases involving "complex issues, multiple parties, difficult legal questions, or unusual proof problems." FED. R. CIV. P. 16(c)(12); *see also* Wright & Miller 6A Fed. Prac. & Proc. Civ.2d § 1525. Under the Federal Rules, courts are directed to develop a case-specific management plan that reflects the unique circumstances of each case and that facilitates the formulation and simplification of issues for trial. *See* FED. R.

[4] Despite Plaintiffs' strained construction of these public statements, one would hope that after 1 ½ years of litigation, Plaintiffs would not contend that such statements serve as a substitute for the scientific evidence necessary to meet their *prima facie* burden. This repeated posturing by Plaintiffs reinforces the necessity of entering the Proposed CMO to facilitate the orderly production of evidence related to Plaintiffs' broadly sweeping claims.

CIV. P. 16(c). Defendants' Proposed CMO achieves these results. This Court should enter the Proposed CMO because it is well-tailored to Plaintiffs' claims and because it provides a thoughtful, rational means for this Court to manage the "complex issues, multiple parties, difficult legal questions, [and] unusual proof problems" presented by Plaintiffs' claims. *Id*.

Plaintiffs have no support for their assertion that that Defendants "are attempting to use a procedural vehicle (a case management order) to achieve a substantive end (dismissal of claims and summary judgment in their favor)." Response at 13. Although the Proposed CMO references possible summary judgment motions if Plaintiffs fail to identify evidence sufficient to create a triable issue of material fact, the Proposed CMO simply requires Plaintiffs to produce the *prima facie* evidence that the law requires any plaintiff to produce to avoid summary judgment. This is hardly a remarkable proposition. Moreover, motions for summary judgment are necessarily subject to the rigorous standards of Fed. R. Civ. P. 56. Defendants' Proposed CMO is consistent with the Federal Rules and the substantive law governing Plaintiffs' claims. Such orders have been entered in several cases involving similarly complex causation issues. *See*, *e.g*., *Acuna v. Brown & Root Inc*., 200 F.3d 335, 340 (5th Cir. 2000), and Motion at 10-11 (citing cases in which *Lone Pine*-type orders have been entered).

2. This case is similar to cases in which *Lone Pine* orders have been used

Plaintiffs argue that (1) *Lone Pine*-type CMOs are entered only in mass tort cases, and (2) the Proposed CMO unfairly requires Plaintiffs to "prove [their] entire case before the close of discovery." Response at 13. However, Plaintiffs have not cited any legal authority which would prohibit this Court from entering the Proposed CMO, and Plaintiffs' equitable arguments are frivolous. Plaintiffs acknowledge that "*Lone Pine* case management orders are a mass tort case management device," Response at 4 (emphasis by Plaintiffs), and that according to the Fifth

Circuit, "Lone Pine orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation." *Id*. at 6, (citing *Acuna*, 200 F.3d at 340) (emphasis by Plaintiffs). Plaintiffs then assert that "[t]he instant action is indisputably not a mass tort case . . ." *Id*. Plaintiffs are wrong.

Plaintiffs have asserted traditional tort claims under theories of nuisance and trespass, and claims for CERCLA natural resource damages ("NRD"). *See* First Amended Complaint ("FAC") at ¶¶ 78-89, 98-127. Courts considering CERCLA NRD claims recognize that claims for NRD are essentially property damage claims arising from statutory tort. *See, e.g., New York v. Lashins Arcade Co.*, 881 F. Supp. 101, 103-04 (S.D.N.Y. 1995) (holding that "recovery for loss of natural resources is similar to an action in tort or trespass."); *and In re Acushnet River & New Bedford Harbor: Proceedings Re: Alleged PCB Pollution*, 712 F. Supp. 994, 1000 (D. Mass. 1989) (holding that an action for CERCLA NRD "sounds basically in tort . . . [because] the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for injury caused by the defendant's wrongful breach.").

Notwithstanding Plaintiffs' protestations to the contrary, Plaintiffs' claim for CERCLA NRD fits the description of a "mass tort." Plaintiffs are asserting claims against multiple Defendants based upon decades of alleged activities occurring on hundreds of geographically distinct and independent poultry growing operations in both Oklahoma and Arkansas for alleged injuries to properties within the more than one million acres in the IRW. Likewise, Plaintiffs have asserted nuisance and trespass claims on a massive scale. Plaintiffs' gamesmanship and wordplay cannot alter this indisputable fact. Simply put, Plaintiffs' Complaint is mass tort litigation and the entry of a *Lone Pine*-type order such as Defendants' Proposed CMO is wholly appropriate under these facts.

Likewise, there is no merit to Plaintiff's complaint that Defendants' Proposed CMO requires Plaintiffs to "prove [their] entire case before the close of discovery." Response at 13. The Proposed CMO only requires Plaintiffs to come forward with the type, and quantum, of *prima facie* evidence that the law mandates they produce to support their claims, and "information that plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3)." *Acuna*, 200 F.3d at 340. Like most *Lone Pine*-type orders, Defendants' Proposed CMO simply requires an evidentiary showing that Plaintiffs have basic information regarding the nature of their alleged injuries; the circumstances under which Plaintiffs allege their property interests have been exposed to harmful substances; the sources of those harmful substances; and the evidentiary bases for believing that the named Defendants are responsible for those alleged injuries. *See id*.

Plaintiffs argue that they should not be required to produce evidence in support of their claims because there is "plenty of publicly-available evidence" allegedly supporting Plaintiffs' claim that "poultry waste causes an adverse impact on the environment generally, and an adverse impact on the environment of the Illinois River Watershed in particular." Response at 7-8. Plaintiffs are wrong for three reasons. First, this lawsuit is not about whether land application of poultry litter "generally" affects the "environment." Plaintiffs have sued specific companies over specific conduct allegedly causing specific harm, and the law requires Plaintiffs to provide proof to support such specific allegations. Second, as demonstrated in the chart attached hereto as Exhibit A, Plaintiffs' sweeping claims are not supported by the publicly-available evidence Plaintiffs cite in Exhibits 7 through 13 to their Response. Third, parties may not avoid their discovery and disclosure obligations by generally referencing publicly-available information.

See, e.g., Flour Mills of America, Inc. v. D. F. Pace, 75 F.R.D. 676, 681-82 (E.D. Okla. 1977) *and City Consumer Servs., Inc. v. Horne*, 100 F.R.D. 740, 747 (D. Utah 1983).

Further, Plaintiffs' claim for CERCLA NRD is unusual and thus, warrants special case management. Under normal circumstances, plaintiffs pursue CERCLA NRD after remediation activities have been completed because one of the primary measures of NRD is the damage that cannot be repaired by restoration or remediation efforts. *See, e.g., In re Acushnet River & New Bedford Harbor: Proceedings Re: Alleged PCB Pollution*, 712 F. Supp. at 1000 (" . . . CERCLA enforcement proceedings ought normally progress through an administrative stage in which an environmental hazard is identified, a cost effective plan adopted to deal with it, and those costs assessed against the responsible parties . . . the judicial power comes into play if there is a dispute as to who the responsible parties are, if the responsible parties fail to own up or if, *after* the clean up takes place, injury to natural resources remains despite the clean up and a settlement cannot be reached.") (italics in original). Because Plaintiffs have not yet identified the remediation activities, if any, that have been performed in the IRW, this Court should enter Defendants' Proposed CMO because it provides a means of determining whether Plaintiffs have sufficient evidence to support their CERCLA NRD claims at this time or if, in the absence of any remediation activities, Plaintiffs' NRD claims should be dismissed as speculative and premature.

3. Plaintiffs' arguments conflict with the Federal Judicial Center's Manual for Complex Litigation (the "Manual")

Plaintiffs cite the Manual as support for their opposition to the Proposed CMO because the Manual's section on managing CERCLA cases does not specifically address *Lone Pine* orders. *See* Response at 6. However, Plaintiffs' reliance on the Manual is misplaced because, despite the fact that the Manual does not reference *Lone Pine* orders by name, the Manual's recommendations for effectively managing CERCLA litigation are diametrically opposed to

Plaintiffs' intransigent position of resisting the disclosure of essential evidence to support their claims. For example, the same section of the Manual cited by Plaintiffs also states that, in CERCLA actions, courts should consider entering a CMO that will

> order the early exchange of information between the parties regarding the identity of all known PRPs, including those documents reflecting a party's relationship with the site, and the production by the government to PRPs of all files relating to the site, including documents reflecting the history, operation, investigation, sampling, monitoring, and remedial actions at the site . . .

See Manual at § 34.21. The Manual further states that courts may effectively narrow the issues and "reveal the strengths and weaknesses of the parties' positions" by "[p]ressing the lawyers to identify facts supporting each element of each claim or defense and to tie the claim or defense to the legal framework of CERCLA . . ." *Id*. § 34.26.

With respect to managing discovery in CERCLA actions, the Manual states that discovery can be effectively managed by identifying specific areas of inquiry such as "site investigations done by any party, including . . . records of any sampling, testing, removal, or remediation conducted at the site . . ." *Id*. at § 34.28. The Proposed CMO is consistent with the Manual's recommendations for effectively managing CERCLA litigation because it requires Plaintiffs to identify facts supporting each element of each claim and to tie the claim to the legal framework of CERCLA. *See id*. at § 34.26. Because Defendants' affirmative defenses are shaped by, and dependent upon, Plaintiffs' claims, Defendants should not be required to provide similar disclosures unless and until they receive fair notice of Plaintiffs' claims and evidence.

4. Defendants' Proposed CMO will assist this Court in identifying and narrowing the disputed issues for trial

A recent Tenth Circuit decision demonstrates the importance of a thoughtful and orderly approach to managing cases containing multiple overlapping claims for property damage and alleged pollution like those asserted by Plaintiffs. *See New Mexico v. General Electric Co., et*

al., ___ F.3d ___, 2006 WL 3072590 (10th Cir. October 31, 2006). Like the instant matter, the New Mexico Attorney General ("NM AG") sought recovery for alleged hazardous waste contamination under theories of NRD, nuisance, and trespass. *See id*. at *8. However, the district court held that the NM AG could not maintain her trespass action because she initiated the litigation to protect "the State's broader sovereign and public trust/parens patriae interests," not to protect private property rights. *Id*. at *9.

Like the NM AG, Plaintiffs' Complaint seeks recovery for trespass to unspecified properties under the theory of *parens patriae*. *See* FAC at ¶ 5. Under the reasoning of the Tenth Circuit, entry of Defendants' Proposed CMO would assist this Court in determining whether Plaintiffs have viable claims, such as trespass, because the Proposed CMO requires Plaintiffs to identify the specific property interests for which Plaintiffs claim the right to exclusive possession. *See* Proposed CMO at 11. If Plaintiffs cannot identify specific property interests that have been invaded, and instead assert only public trust interests under the theory of *parens patriae*, this Court must dismiss Plaintiffs' trespass claims. *See* 2006 WL 3072590, at *9. Similarly, the Tenth Circuit also discussed the circumstances in which CERCLA will preempt state law claims for nuisance. *Id*. at 16-17. Entry of the Proposed CMO would require Plaintiffs to articulate their specific nuisance claims and provide this Court with a means of determining whether those claims are preempted by CERCLA.

III. CONCLUSION

For the reasons stated above, and as more fully set forth in Defendants' Motion (Docket No. 946), Defendants respectfully request that the Court provide case management procedures for the instant matter by granting the relief requested in Defendants' Motion.

Respectfully submitted,

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and I further certify that a true and correct copy of the above and foregoing will be mailed via regular mail through the United States Postal Service, postage properly paid, on the following who are not registered participants of the ECF System:

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